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December 17, 1999

The Honorable William E. Kennard
Chairman
Federal Communications Commission
445 - 12th Street, S.W.
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: **CC Docket No. 99-295 - *Ex Parte* Letter Filed in Conjunction with Bell Atlantic's Section 271 Application for New York**

Dear Chairman Kennard:

The Telecommunications Resellers Association ("TRA"),¹ by undersigned counsel and pursuant to *Public Notice*, DA 99-2779 (released December 10, 1999), hereby responds to the *ex parte* letter submitted in the subject proceeding on December 10, 1999, by Thomas J. Tauke, Senior Vice President - Government Relations of Bell Atlantic. In his letter, Mr. Tauke advises the Commission of Bell Atlantic's willingness to establish, subject to a variety of enumerated conditions, a structurally "separate" affiliate for the provision of xDSL-based advanced services within the State of New York. Among these conditions is one that would afford "BellAtlantic - New York . . . the treatment provided to SBC States in the SBC/Ameritech conditions." Such "treatment" would relieve Bell Atlantic - New York of its Section 251(c)(4) resale obligations as they relate to xDSL-based advanced services in direct contravention of express statutory mandates. While TRA would not oppose the provision of xDSL-based advanced services by Bell Atlantic - New York through a structurally separate affiliate, it strongly urges the Commission not to sanction use by Bell Atlantic - New York of such an entity to avoid its obligation to make xDSL-based advanced services available at wholesale rates for resale.

The Commission has recently concluded that the discounted resale obligation of Section 251(c)(4) of the Communications Act of 1934 (the "Communications Act"), as amended by the Telecommunications Act of 1996 (the "Telecommunications Act"), 47 U.S.C. 251(c)(4), extends to

¹ A national trade association, TRA represents more than 800 entities engaged in, or providing products and services in support of, telecommunications resale. TRA was created, and carries a continuing mandate, to foster and promote telecommunications resale, to support the telecommunications resale industry and to protect and further the interests of entities engaged in the resale of telecommunications services. TRA is the largest association of competitive carriers in the United States, numbering among its members not only the large majority of providers of domestic interexchange and international services, but the majority of competitive local exchange carriers, as well.

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List ABCDE

1620 I Street, N.W.
Suite 701
Washington, D.C. 20006
Telephone (202) 293-2500
Facsimile (202) 293-2571

xDSL-based advanced services sold at retail by incumbent local exchange carriers ("LECs") to business and residential end users.² The Commission emphasized that this finding "reinforce[d] the resale requirement of the Act by ensuring that resellers are able to acquire advanced services sold by incumbent LECs to residential and business end-users at wholesale rates."³ This action, the Commission further noted, was necessary to "ensur[e] that competitive carriers are able to enter the advanced services market by providing to consumers the same quality service offerings provided by incumbent LECs."⁴

By sanctioning the use by Bell Atlantic - New York of a separate affiliate as the *exclusive vehicle* by which xDSL-based advanced services would be provided *and by affording Bell - Atlantic - New York "the treatment provided to SBC States in the SBC/Ameritech conditions,"* the Commission would negate the pro-competitive impact of its *Advanced Services Resale Order* within the State of New York. In the State of New York, resale carriers would not be "able to acquire advanced services sold by incumbent LECs to residential and business end-users at wholesale rates."⁵ And as a result, resale carriers in the State of New York would not be "able to enter the advanced services market by providing to consumers the same quality service offerings provided by incumbent LECs."⁶ In short, the Commission would take away from competitive carriers operating within the State of New York a competitive right it recognized as being of critical importance a mere six weeks earlier. As the Commission long ago held, anything that "prevent[s] a new entrant from offering services that consumers perceive to be equal in quality to the offerings of incumbent LECs" stands as a significant impediment to "[v]igorous competition."⁷

TRA submits, moreover, that allowing an incumbent LEC to avoid its Section 251(c)(4) resale obligations as they relate to xDSL-based advanced services simply by using a wholly owned and controlled affiliate as its exclusive vehicle for the provision of such services is not only bad public

² Deployment of Wireline Services Offering Advanced Telecommunications Capability (Second Report and Order), CC Docket No. 98-147, FCC 99-330, ¶ 20 (November 9, 1999) ("Advanced Services Resale Order").

³ Id.

⁴ Id.

⁵ Id.

⁶ Id.

⁷ Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (First Report and Order), 11 FCC Rcd. 15499, ¶ 16 (1996), *recon.* 11 FCC Rcd. 13042 (1996), *further recon.* 11 FCC Rcd. 19738 (1996), *further recon.*, 12 FCC Rec. 12460 (1997), *aff'd/vacated in part sub. nom. Iowa Util. Bd v. FCC*, 120 F.3d 753 (1997), *writ of mandamus issued* 135 F.3d 535 (8th Cir. 1998), *aff'd/vacated in part sub. nom. AT&T Corp., et al. v. Iowa Utilities Board*, 119 S.Ct. 721 (1999).

policy, but it is unlawful. As the Commission has recognized, it lacks the authority under either Section 10 of the Communications Act, 47 U.S.C. § 159, or Section 706 of the Telecommunications Act, Pub. L. No. 104-104, 110 Stat. 56, § 706 (1996),⁸ to forbear from strictly applying the requirements of Section 251(c) until such time as that provision has been fully implemented. Thus, the Commission has declared that "section 10(d) expressly forbids the Commission from forbearing from the requirements of sections 251(c) and 271 'until it determines that those requirements have been fully implemented'" and that "[t]here is no language in section 10 which carves out an exclusion from this prohibition for actions taken pursuant to section 706."⁹ As the Commission has declared, Section 251(c) is one of two "cornerstones of the framework Congress established in the 1996 Act to open local markets to competition," and, accordingly, it was "Congress' intention that the Commission not forbear from section[] 251(c) . . . until . . . [that] section[] was fully implemented."¹⁰

It is well settled that the Commission "may not accomplish indirectly that which . . . it may not do directly."¹¹ An agency lacking statutory authority to take a particular action may not accomplish the same result indirectly.¹² And this doctrine is that much more compelling when an agency is expressly prohibited from reaching the end it seeks to achieve indirectly.¹³

Here, however, the Commission, without expressly forbearing from strict application of the discounted resale mandate of Section 251(c)(4) to Bell Atlantic - New York's provision of xDSL-based advanced services would achieve that precise result by allowing Bell Atlantic - New York to offer such services exclusively through a wholly owned and controlled affiliate against which the Commission would not enforce the requirements of Section 251(c)(4). In a rather transparent manner, the Commission would thus be accomplishing indirectly that which Congress expressly forbid it from doing. Drawing a sharp distinction between Bell Atlantic - New York and a wholly owned and controlled affiliate for Section 251(c)(4) purposes is blatant enough. Assigning to that wholly owned and controlled affiliate the exclusive right to provide xDSL-based advanced services

⁸ Section 706 is reproduced in the notes under 47 U.S.C. § 157.

⁹ Deployment of Wireline Services Offering Advanced Telecommunications Capability (Memorandum Opinion and Order), 13 FCC Rcd. 24011, ¶¶ 69 - 79 (1998).

¹⁰ Deployment of Wireline Services Offering Advanced Telecommunications Capability (Second Report and Order), CC Docket No. 98-147, FCC 99-330 at ¶ 73, fn. 151.

¹¹ Iowa Utilities Board v. FCC, 135 F.2d 535 (8th Cir. 1998).

¹² T.I.M.E. Incorporated v. United States, 359 U.S. 464, 475 (1959).

¹³ Natural Resources Defense Council, Inc. v. EPA, 683 F.2d 752, 763 (3rd Cir. 1982); The Chesapeake and Ohio Railway Company v. ICC, 392 F.Supp. 358, 367 (EDVA 1975).

while simultaneously relieving it of the Section 251(c)(4) discounted resale obligation clearly crosses the line between the permissible and the unlawful.

Further undermining the lawfulness of the proposed Commission action is the Section 251(h), 47 U.S.C. § 251(h), mandate that "successors or assigns" of incumbent LECs, as well as carriers that occupy a market position comparable to, and substantially replace within a market, incumbent LECs, must be treated as incumbent LECs for purposes of Section 251(c). A wholly owned and controlled affiliate of an incumbent LEC which is the sole source of a service offering within the incumbent LEC's corporate family clearly satisfies the Section 251(h) standard. TRA is aware that the Commission reached a different conclusion in assessing the legality of the separate advanced services affiliates that the merged SBC Communications/Ameritech will create as a condition of the Commission's approval of that merger, but respectfully disagrees with that assessment.¹⁴ A strong case could be made that a wholly owned and controlled incumbent LEC affiliate which, among other things, would succeed to the incumbent LEC's advanced services customers, be allowed to utilize on an exclusive basis the incumbent LEC's name, logos and service marks, be free to jointly market its services with the incumbent LEC on an exclusive basis, be permitted to obtain personnel and equipment from the incumbent LEC on an exclusive basis, and be authorized to share office space with the incumbent LEC, should be classified as an incumbent LEC under Section 251(h). When such an entity becomes the sole source provider of a service offering within the incumbent LEC's corporate family, it clearly takes on the mantle of an incumbent.

In such a circumstance, a customer desirous of acquiring xDSL-based advanced services from the incumbent LEC would have no choice but to deal with the incumbent LEC's wholly owned and controlled advanced services affiliate. The incumbent LEC would have effectively assigned to its advanced services affiliate its right to provide xDSL-based advanced services and with respect to such services, the advanced services affiliate would occupy the position of the incumbent in the market, having replaced its parent as the incumbent provider of these services. Indeed, with respect to xDSL-based advanced services, the incumbent LEC would have exited the market.

With respect to resale competitors, the competitive impact will be the same whether the Commission directly forbears from enforcing the Section 251(c)(4) discounted resale mandate against Bell Atlantic - New York or permits Bell Atlantic - New York to avoid that obligation by offering xDSL-based advanced services exclusively through a wholly owned and controlled affiliate which the

¹⁴ The Commission has at least recognized that "an entity may become an incumbent LEC by being a successor or assign of a LEC that, as of February 8, 1996, was providing local exchange service in a particular area and was a member of NECA, even if that entity was not itself providing local exchange service in a particular area or a member of NECA as of that date." Ameritech Corporation, Transferor, and SBC Communications Inc., Transferee, for Consent to Transfer Control of Corporations Holding Commission Licenses and Authorizations Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24 25, 63, 90, 95, and 101 of the Commission's Rules, (Memorandum Opinion and Order), CC Docket No. 98-141, FCC 99-279, ¶ 448 (released October 8, 1999).

Commission relieves of any Section 251(c)(4) obligation. In both instances, resale competitors will not be "able to acquire advanced services sold by incumbent LECs to residential and business end-users at wholesale rates" or be "able to enter the advanced services market by providing to consumers the same quality service offerings provided by incumbent LECs."¹⁵

The lawfulness of the proposed Commission action is still further undermined by the clear conflict between that action and two of the foundational principles of the Telecommunications Act -- *i.e.*, that resale should serve as a viable entry option for new entrants, particularly smaller providers, seeking to provide competitive local service, and that there must be an incumbent LEC for every geographic location and service offering. With regard to the first principle, the Telecommunications Act, as the Commission has repeatedly acknowledged, "contemplates three paths of entry into the local market -- the construction of new networks, the use of unbundled elements of the incumbent's network, *and resale*."¹⁶ Resale provides an interim entry vehicle for carriers that intend to deploy their own facilities, serves as a means for competitors to "reach customers in less densely populated areas," and, critically from TRA's perspective, constitutes "an important entry strategy . . . for small businesses that cannot afford to compete in the local exchange market by purchasing unbundled elements or by building their own networks."¹⁷ Thus, the Commission readily acknowledged its obligation "to implement rules that eliminate statutory and regulatory barriers and remove economic impediments" to resale as well as the other two "coequal" entry strategies, and committed to ensure that "all pro-competitive entry strategies may be explored."¹⁸ Consistent with this commitment, the Commission also adopted a presumption that resale restrictions and conditions are unreasonable,¹⁹ recognizing that "the ability of incumbent LECs to impose resale restrictions and conditions is likely to be evidence of market power."²⁰

If the Commission were to take the actions proposed by Bell Atlantic, it would, to use the Commission's own words, undermine "the resale requirement of the Act by ensuring that resellers

¹⁵ Deployment of Wireline Services Offering Advanced Telecommunications Capability (Second Report and Order), CC Docket No. 98-147, FCC 99-330 at ¶ 20.

¹⁶ Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (First Report and Order), 11 FCC Rcd. 15499 at ¶ 12 (emphasis added).

¹⁷ Id. at ¶¶ 12, 32.

¹⁸ Id. at ¶ 12.

¹⁹ Id. at ¶ 939.

²⁰ Id.

are [un]able to acquire advanced services at wholesale rates."²¹ This in turn would, again using the Commission's own words, "ensur[e] that competitive [resale] carriers are [un]able to enter the advanced services market by providing to consumers the same quality service offerings provided by incumbent LECs."²² As noted previously, the Commission has recognized that anything that "prevent[s] a new entrant from offering services that consumers perceive to be equal in quality to the offerings of incumbent LECs" stands as a significant obstacle to competitive viability.²³ "[E]limination of these obstacles is essential," the Commission has acknowledged, "if there is to be a fair opportunity to compete in the local exchange and exchange access markets."²⁴

With respect to the second foundational principal that would be violated by the proposed Commission action, implicit in the "three paths of entry into the local market" contemplated by Congress is that there would be in every geographic market and for every telecommunications service, an incumbent LEC through which to implement these strategies. Physical network interconnection cannot occur without an incumbent network with which to interconnect. Access to network elements cannot take place without an incumbent network to unbundle. And discounted resale is a meaningless concept in the absence of incumbent LEC retail services. Thus, Congress defined the term "incumbent local exchange carrier" to encompass not only all franchised wireline providers of local exchange service active on the date of enactment of the Telecommunications Act, but "successors and assigns" of such entities and any entity which occupies a "comparable" position in the market, and "substantially replaces," an incumbent LEC.²⁵

The definition assigned to the term "incumbent local exchange carrier" reaches all existing franchised wireline LECs and any entity which assumes the mantle of the incumbent either with respect to a given geographic area or a specific service, assuring that there would always be retail services available at wholesale rates, network elements accessible on an unbundled basis and physical networks with which to interconnect. Moreover, Congress ensured through Section 10(d) that such retail services, network elements and physical network interconnections would remain available to competitors until Section 251(c) had been fully implemented and the Commission could determine that such availability was no longer necessary to ensure that services were offered on just,

²¹ Deployment of Wireline Services Offering Advanced Telecommunications Capability (Second Report and Order), CC Docket No. 98-147, FCC 99-330 at ¶ 20.

²² Id.

²³ Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (First Report and Order), 11 FCC Rcd. 15499 at ¶ 16.

²⁴ Id. at ¶ 18.

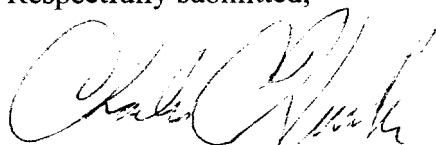
²⁵ 47 U.S.C. § 251(h).

reasonable and nondiscriminatory terms, to protect consumers, serve the public interest, and promote competitive market conditions.²⁶

If Bell Atlantic - New York were permitted to offer xDSL-based advanced services exclusively through a separate affiliate and that affiliate were not deemed to be an incumbent pursuant to Section 251(h), there would be no incumbent LEC for xDSL-based advanced services in the Bell Atlantic - New York local service areas. The carefully crafted Congressional construct providing for resale at wholesale rates, unbundled network access and physical network interconnection would, accordingly, be eliminated for these services. And the Congressional mandate that Section 251(c) obligations remain intact until Section 251(c) had been fully implemented would be ignored.

Accordingly, the Telecommunications Resellers Association strongly urges the Commission, if it elects to require Bell Atlantic - New York to provide xDSL-based advanced services exclusively through a structurally separate affiliate, to require that advanced services affiliate to make such services available at statutory discounts for resale. Such action would be both consistent with law and the pro-competitive mandates of Congress and constitute sound public policy. To do otherwise would not only be unwise and unlawful, but would represent a significant step backward for competition in the State of New York, given that Bell Atlantic was the only major incumbent LEC to honor its statutory obligation to make xDSL-based advanced services available for resale pursuant to Section 251(c)(4) without first being ordered by the Commission to do so.

Respectfully submitted,



Charles C. Hunter
General Counsel
Telecommunications Resellers Association

cc: Commissioner Susan Ness
Commissioner Gloria Tristani
Commissioner Harold Furchtgott-Roth
Commissioner Michael Powell
Thomas J. Tauke